IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA and CITY OF PLAQUEMINE, LOUISIANA,
Petitioners,

versus

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The question presented is whether the actions of a city are automatically outside the scope of the federal antitrust laws.[1]

STATEMENT OF THE CASE

The question comes before the Court as the result of the dismissal by the district court under Rule 12[2] of the amended

[1] "The sole question in this appeal is whether the actions of a city are automatically outside the scope of the federal antitrust laws." (*City of Lafayette, et al. v. LP&L*, App. p. 51.) "App." refers to Joint Appendix.

[2] See App. pp. 42-43 for Cities' motion to dismiss.

counterclaim of Louisiana Power & Light Company (LP&L), respondent in this matter, against the Cities of Lafayette and Plaquemine (Cities), petitioners herein.[3] LP&L charged that the Cities violated the antitrust laws of the United States through entering into contracts in restraint of trade and conducting sham and frivolous litigation. The actions which precipitated the appeal began when LP&L moved for leave to amend and supplement its answer and counterclaim to charge one of the petitioners with violating the antitrust laws by illegally requiring people living outside its city limits to take electricity from the city in order to obtain gas and water. (App. pp. 33-34.) The Cities opposed LP&L's motion on the ground that LP&L's amendment failed to state a claim upon which relief may be granted. After the District Court denied LP&L's motion for leave to amend (App. pp. 29-30), LP&L filed a motion for reconsideration in which it conceded that if its amendment failed to state a claim, so did its unamended counterclaim. (App. pp. 30-32.) The Cities then filed a motion to also dismiss LP&L's counterclaim. (App. pp. 42-43.)

On February 28, 1975 the district court issued an order for the purpose of clarifying the record, granting LP&L's motion for leave to amend its counterclaim to charge an illegal tie-in. (App. pp. 44-48.) Then, in the same order the district court ruled that the entire counterclaim should be dismissed. Upon dismissal LP&L appealed. (App. p. 49.) Relying upon this Court's holding that the antitrust laws could indeed apply even to what this Court had described as "a state agency by law"

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[3] In dismissing the counterclaim, the district court noted: "The instant case does not present so clear a governmental activity. These plaintiff cities are engaging in what is clearly a business activity; activity in which a profit is realized. It is for this reason that this court is reluctant to hold that the antitrust laws do not apply to *any* state activity. However, in light of the clear language and implication of the *Saenz* case it shall be this court's holding that purely state government activities are not subject to the requirements of the antitrust laws of the United States." (App. pp. 47-48.) See also Petitioners' Brief p. 4.

[*Goldfarb v. Virginia State Bar*, 421 U.S. 773, 789-790 (1975)] the United States Court of Appeals for the Fifth Circuit reversed. (App. pp. 51 *et seq.*)

SUMMARY OF ARGUMENT

This Court held in *Parker v. Brown*, 317 U.S. 341 (1943), that the Sherman Act did not apply to the state acting as sovereign in imposing a restraint as an act of government. 317 U.S. at 352. In *Goldfarb v. Virginia State Bar Association*, 421 U.S. 773 (1975), this Court established one criterion for the applicability of *Parker v. Brown* immunity, *i.e.*, "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." 421 U.S. at 790. This Court found that under this test even a state agency by law could be subject to the standards of the antitrust laws. See *Goldfarb*, 421 U.S. at 789-790. For *Parker v. Brown* immunity to exist, "anticompetitive activities must be compelled by direction of the State acting as a sovereign." 421 U.S. at 791.

Applying this *Goldfarb* criterion, the United States Court of Appeals for the Fifth Circuit reversed the dismissal of LP&L's counterclaim, as amended, and remanded the matter for a determination of whether the anticompetitive activities of the Cities "fall within the intended scope of the powers granted to the Cities by the legislature." (App. p. 58.) LP&L contends that the anticompetitive conduct by the Cities is beyond the scope of authorization by the legislature.

Subsequent to *Goldfarb* this Court held in *Cantor v. Detroit Edison*, 428 U.S. 579 (1976) that direct *Parker v. Brown* immunity applied only "to official action taken by state officials." 428 U.S. at 591. Petitioners, Louisiana municipalities, also fail

to meet this additional *Cantor* criterion. In Louisiana "a municipal corporation, when engaged in the operation of a public utility, is subject to the same rules that are applicable to a private corporation." *Hicks v. City of Monroe Utilities Commission*, 237 La. 848, 892; 112 So.2d 635, 650 (La. S.Ct. 1959). The action in question is not action of a municipal corporation *qua* state agency, but one as agent of its corporators engaged in private acts for private gain. *New Orleans, Mobile and Chattanooga Railroad Company v. City of New Orleans*, 26 La. Ann. 478, 481 (La. S.Ct. 1874).

Petitioners' policy argument is unsound. Applicability of the antitrust laws in these circumstances is warranted by considerations of consumer welfare, stability of decisions, and common fairness. Given the policies and principles of the antitrust laws as previously determined by this Court, the Cities' claim of immunity should be denied.

ARGUMENT

I. Municipal Corporations Are Not Exempt From the Antitrust Laws in Operating Utility Systems

Since this matter is before this Court on barebones pleadings, there is little that can be said in the way of analysis of facts. LP&L has thus far had no opportunity to develop in the record the facts of its case against the Cities, save what it has developed incidentally to the Cities' case against LP&L, which are not of record here. Only the few matters that came to the direct attention of officers of the company are included in the affidavit of Mr. Wyatt (App. pp. 35-41).

Thus, this is basically a matter of pure law: Are the actions of a city "engaging in what is clearly a business activity; activity in which a profit is realized" (App. p. 47) automatically outside the scope of the federal antitrust laws? Is there an immunity even where a city has, as LP&L alleges, "unlawfully restrained trade . . . by contracting to provide customers outside city limits certain products (*e.g.*, gas and water) only on the condition that said customers also purchase a different tied product, *i.e.*, electricity, or at least agree that they will not purchase that tied product from any other supplier"? (App. p. 33.) How does the alleged status of a "state agency" protect those consumers who are excluded from the municipal franchise and have no effective political control over what the city does? LP&L submits that the answer given by the United States Court of Appeals for the Fifth Circuit is supported by an analysis of the principles enunciated by this Court in *Parker v. Brown*, 317 U.S. 341 (1943), *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

A. **The Parker v. Brown Decision.**

The Cities claim absolute immunity[4] from the antitrust laws on the basis of the Supreme Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943). They argue that this decision holds that the Sherman Act was not intended to apply to any actions of a state and means that they cannot be liable because they are "wholly governmental state bodies", each "merely a subdivision of the state."[5] (Petitioners' Brief, p. 5.) An analysis of this decision fails to support their argument.

In *Parker v. Brown* the plaintiff, a producer and packer of raisins in California, brought suit to enjoin the State Director of Agriculture and others from enforcing a state agricultural proration program. A three-judge district court held that the raisin marketing program directly interfered with and burdened interstate commerce and was therefore invalid under the commerce clause of the Constitution and therefore issued the injunction. 39 F.Supp. 895 (S.D. Cal. 1941).

This Court heard argument on the case at the October Term, 1941. On May 11, 1942 the Court ordered it restored to the

[4] The Cities purport to distinguish their argument as one of the *inapplicability* of the antitrust laws rather than *immunity*. This distinction is not supported by the decisions of this Court. In *Goldfarb v. Virginia State Bar Association*, 421 U.S. 773 (1975) the Court treated the question of the application of the antitrust laws to the State Bar, "a state agency by law," (*id.*, 789-790), as one of immunity, noting that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions." (*Id.*, 787.)

[5] As noted by the appellate court below, the Cities "would have us equate cities and states for purposes of determining 'state action'. No authority is cited for this proposition, and the only appellate decision directly on point has resolved this issue against plaintiffs." (App. p. 54, n. 6.) As shown *infra* in this brief those bald statements by the Cities are in error. Moreover, as this Court was careful to note in *Cantor v. Detroit Edison*, 428 U.S. 579 (1976), the broad use of the term "state action" as in *Monroe v. Pape*, 365 U.S. 167 (1961), is not that intended by *Parker v. Brown*, 317 U.S. 341 (1943). See *Cantor*, 428 U.S. at 590.

docket for reargument for October 12, 1942, requested the Solicitor General to participate as *amicus curiae* and requested the parties to address the question *inter alia* of "whether the state statute involved is rendered invalid by the action of Congress in passing the Sherman Act. . . ." *Supplemental Brief for Appellants* pp. 1-2 (quoting statement by Court).

In carefully selected language plainly limiting its holding, this Court ruled there was no antitrust violation where the state "as sovereign imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Parker v. Brown*, 317 U.S. 341, 352 (1943). In contrast, the Cities read *Parker* simply as holding "that the Sherman Act does not apply to state government." (Petitioners' Brief, p. 5.) This ignores the qualifications "as sovereign" and "as an act of government" contained in the Court's *Parker* opinion.[6] As will be shown, *infra*, the activities of the Cities here at issue do not meet the *Parker* criterion of immunity for an action "as sovereign" required as "an act of government."

B. **The Goldfarb Decision.**

Subsequent to the district court's dismissal of LP&L's counterclaim, this Court decided *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Plaintiffs had brought suit against the Virginia State Bar and Fairfax County Bar Associations alleging that the County Bar's adoption of a minimum fee schedule, declared by the State Bar to be an enforceable standard, constituted price-fixing and restraint of trade and commerce in violation of

[6] It also goes far beyond even what the State of California argued. In the *Supplemental Brief for Appellants* filed by the Honorable Earl Warren, later Chief Justice of this Court, the State relied on the principle that the doctrine of monopoly *"cannot be applied to a state in exercising governmental functions."* *Supplemental Brief for Appellants*, pp. 39-40.

Section 1 of the Sherman Act. The district court found that minimum fee schedules constituted price-fixing, but also held that the State Bar was immune under *Parker v. Brown* since it acted as an administrative agency of the Supreme Court of Virginia, as stipulated for the record by the parties. *Goldfarb v. Virginia State Bar*, 355 F.Supp. 491, 495-496 (E.D. Va. 1973). It distinguished the County Bar on the basis that it was a voluntary association of private persons and held the County Bar could be liable. The Court of Appeals for the Fourth Circuit agreed with the district court that the State Bar was immune under *Parker v. Brown* (and that the *Parker v. Brown* immunity did not apply to the County Bar), but held against plaintiffs on other grounds. *Goldfarb v. Virginia State Bar*, 497 F.2d 1 (4th Cir. 1974). The plaintiffs then took the matter to this Court on petition for writ of certiorari.

This Court reversed the decision that the State Bar was not subject to the antitrust laws. It described the State Bar as "a state agency by law." 421 U.S. at 789-790. It looked to state law to determine whether the State required the State Bar to set fees and found that it did not. 421 U.S. at 790. Most importantly, it held: "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." *Ibid.* Thus, under *Goldfarb v. Virginia State Bar* not all state action is immune from antitrust scrutiny, but only a "type" of state activity—where the state acted *as sovereign*. The Court reiterated this requirement by stating that in order for immunity to exist "anticompetitive activities must be compelled by direction of the State acting as a sovereign." 421 U.S. at 791.

The Court also observed that "[t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices

for the benefit of its members." *Ibid.* The Cities, municipal corporations of the State of Louisiana, argue that their status is different from that of the Virginia State Bar in that they are not just state agencies "for limited purposes," *ibid*, but political subdivisions of a state.

The Cities beg the question, since municipal corporations do have a dual nature, in part private and in part public.[7] As will be shown *infra*, the Cities are not acting as state agencies in the discharge of their functions here at issue.

C. The Fifth Circuit's Response to Goldfarb

Given that "[t]he threshold inquiry . . . is whether the activity is required by the State acting as sovereign," *Goldfarb*, 421 U.S. at 790, and given this Court's application of this test to what it described (and the record conclusively established) was "a state agency by law" *ibid*, what should the response of the United States Court of Appeals for the Fifth Circuit have been? The Cities would have that court ignore or distort *Goldfarb*.

The Cities candidly stated their views in their petition for rehearing *en banc* (App. p. 59, *et seq.*). They claimed that the Fifth Circuit committed error in its interpretation of *Goldfarb* in viewing the Virginia State Bar as "a state agency by law" (App. p. 62), though these were the exact words used by this Court. *Goldfarb*, 421 U.S. at 789-790. Even now, in their brief to this Court, the Cities still maintain that "[t]his reading of *Goldfarb* is simply contrary to the facts as stated in the decision." (Petitioners' Brief p. 10.) LP&L submits that the error

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[7] See note 5, *supra*. As will be shown in this brief, *infra*, Louisiana follows the majority rule in recognizing the dual nature of municipal corporations. See also, generally, the cases cited in C.J.S. *Municipal Corporations* §3b.

lies not with the Fifth Circuit, but with the Cities. In reality, the Cities' contention is, in essence, that *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), is wrong, though they will not put it that way.

Petitioners' mistaken notion of how the Fifth Circuit should have responded to this Court's *Goldfarb* decision is further shown by their continued reliance on *Saenz v. University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973). (See Petitioners' Brief, pp. 9, 10, and 17.) The Cities would have had the Fifth Circuit apply the Cities' interpretation of *Saenz* (a decision by the appellate court on its summary calendar[8]), rather than this Court's decision in *Goldfarb*. The appellate court declined this unusual invitation, saying:

> "Even accepting *arguendo* the contention that *Saenz* automatically excludes subordinate state governmental bodies from the antitrust laws, we must still reject the notion that only an en banc Court could reach the result which we reach today. It is settled that the rule against inconsistent panel decisions has no application when intervening Supreme Court precedent dictates a departure from a prior panel's holding. See *Davis v. Estelle*, 5th Cir., 529 F.2d 437, at p. 441 (1976). This is precisely the situation here. The argument that lower state entities are automatically exempt from the Sherman Act has been laid to rest by the Supreme Court in *Goldfarb*." (App. p. 57.)

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[8] The Fifth Circuit did not construe *Saenz* the way the Cities urge. (App. pp. 56-57.) In addition, as this Court noted in *Edelman v. Jordan*, 415 U.S. 651, 671 (1974) summary dispositions "are not of the same precedential value as would be an opinion of this Court treating the question on the merits." Distinctions may be drawn between this Court's summary dispositions and the practice of the Fifth Circuit with respect to its "summary calendar." Nevertheless, it would be odd indeed to accord more weight to this "precedent" than did the Fifth Circuit.

D. The Cantor Decision

The Cities apparently believe that their case is somehow supported by *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). On application to the Fifth Circuit for rehearing *en banc*, the Cities stated "[w]e think the *Cantor* decision calls for reversal of the panel in this case." (App. p. 74.) Yet, in their brief to this Court, the Cities merely argue that "[a]lthough the holding of *Cantor* is not directly relevant to this case, the opinions are." (Petitioners' Brief, p. 12.)

The activity in question in *Cantor* was the distribution by The Detroit Edison Company of electric light bulbs to its customers without charge separate from that made by the company for electricity. The program had been approved by the Michigan Public Service Commission pursuant to a tariff filed by Detroit Edison. The issue in *Cantor* was whether Detroit Edison could claim an absolute immunity for its distribution program under *Parker v. Brown*, 317 U.S. 341 (1943). As the matter had arisen from the granting of summary judgment against the plaintiff, all doubt as to facts were resolved in favor of him. 428 U.S. at 582. The Court inferred that the policy of the State was neutral on the question of whether a utility should or should not have such a program. 428 U.S. at 585.

In *Cantor*, unlike the situation in *Goldfarb*, there was no claim by plaintiff against any public official or any representative of the State. The district court and the court of appeals held that under *Parker* the Commission's approval exempted the practice from the antitrust laws. *Id.*, 581.

In reversing the lower courts' decisions, this Court reiterated that *Parker* "held that even though comparable programs organized by private persons would be illegal, the action taken by state officials pursuant to express legislative command did not violate the Sherman Act." *Cantor v. Detroit Edison Co.*, 428

U.S. 579, 589 (1976). This Court held that in *Parker* Mr. Chief Justice Stone "carefully selected language which plainly limited the Court's holding to official action taken by state officials." *Id.*, 591.

The Cities read this language as somehow supporting their contention that *Parker* establishes a rigid bright-line rule with respect to state action immunity. Such a construction would do the one thing that no member of the Court in *Cantor* wished done: It would nullify *Goldfarb*. All of the Justices of the Court in their opinions took their respective stands by *Goldfarb*. Mr. Justice Stevens, writing for the Court, pointed to the careful use of language in that opinion as weighing against a broad claim of immunity, 428 U.S. at 600. The Chief Justice, concurring in part and dissenting in part, pointed up the emphasis by the Court in *Goldfarb* on the challenged activity rather than the identity of the parties. *Id.*, 604. Mr. Justice Blackmun, concurring, noted *Goldfarb* established a *prerequisite* to immunity, that conduct is required by state law, not what is sufficient to have immunity. *Id.*, 609. Finally, Mr. Justice Stewart, dissenting, relied throughout his opinion on the continuing vitality of *Goldfarb*. *Id.*, 614 *et seq.*

LP&L does not suggest that the *Cantor* decision is without its difficulties. Certainly, for example, the interrelationship between it and *Goldfarb* with respect to anticompetitive conduct of private parties will need to be spelled out in future decisions. But nothing in *Cantor* can be construed as overruling the limitations on state action immunity already recognized by *Parker* and *Goldfarb*. For there to be state action immunity there still must be action by the State (1) *as sovereign* and (2) imposing the anticompetitive conduct in question. The Cities cannot meet those tests in this case.

At most, *Cantor* established a criterion in addition to that of *Goldfarb*, rather than as a substitute for *Goldfarb*. This

additional *Cantor* criterion limits direct state action immunity to "official action taken by state officials." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 591 (1976). For direct state action immunity to exist, both the *Goldfarb* "threshold" criterion and the *Cantor* criterion must be met. For an indirect state action defense to exist, a private defendant must show that his activity was so directed and compelled by the action of the state as sovereign that it would be unfair to deem him the legal cause of such activity.

In any event, *Cantor* cannot be construed as establishing any *ipso facto* immunity on the part of state agencies. Such a construction would, in effect, adopt the very opinion of the Court of Appeals that this Court rejected in *Goldfarb*. See *Goldfarb v. Virginia State Bar*, 497 F.2d 1 (4th Cir. 1974).

E. Application of the Law to This Case.

As this matter arises from the dismissal of LP&L's counterclaim under Rule 12, the Court should assume for purposes of its decision that all of the conduct whereof LP&L complains would violate the antitrust laws but for the defense of state action immunity.[9] For purposes of illustration, LP&L will use what is perhaps the clearest example of an antitrust violation—the tie-in.

The Cities, unlike LP&L, may lawfully engage in the business of distributing natural gas, as well as electricity.[10] A municipally-owned utility system would enjoy the same element of natural monopoly in the areas where it distributes as would any other

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[9] See *Cantor v. Detroit Edison*, 428 U.S. 579, 582 (1976).

[10] LP&L is powerless to counter a tie-in of gas and electricity with its own offer of gas since it cannot lawfully engage in the distribution of gas under the Public Utility Holding Company Act of 1935, 49 Stat. 838 (1935), 15 U.S.C. §79 *et seq.* See *SEC v. Louisiana Public Service Commission*, 353 U.S. 368 (1957).

gas distribution system. Thus, the City of Plaquemine must be deemed to possess monopoly power in its distribution of gas and water in that area immediately to the south of that City and outside the City limits. The inhabitants of that area, being outside the City limits, cannot vote in municipal elections and therefore have no effective political control over the City in the operation of its utility systems. They are fully subject to its monopoly power to the same extent and with the same potential effect as if they were there served by an investor-owned utility.

Under applicable Louisiana law, it is clear that petitioners in the operation of their municipal utility systems are not acting as sovereign with respect to the dispute at issue. The controlling decision in Louisiana is *Hicks v. City of Monroe Utilities Commission*, 237 La. 848, 112 So.2d 635 (La. S.Ct. 1959). In that case, a Louisiana municipal corporation (Monroe) was in competition with LP&L for customers outside its city limits. Monroe owned and operated an electric system and a water distribution system. It did not absolutely refuse to sell its non-electric commodity to LP&L's customers, as did Plaquemine, but it did refuse to sell to LP&L's customers unless they paid a great deal more for water than Monroe charged people who also took electricity from Monroe.

When sued because of this conduct, Monroe, like petitioners here, claimed a special immunity on the ground that it was a state agency. The Louisiana Supreme Court expressly considered and rejected authority from certain other jurisdictions which would have immunized the city by treating it as having some special public character and held:

> "These concepts do not prevail in Louisiana. In this state a municipal corporation, when engaged in the operation of a public utility, is subject to the same rules that are applicable to a private corporation. See *Vicksburg, S. & P. Railway Co. v. City of Monroe*, 1927, 164 La. 1033, 115 So. 136, supra." *Hicks, supra*, 237 La. at 892, 112 So.2d at 650.

In the *Vicksburg* case, applied in *Hicks*, the Louisiana Supreme Court held:

> "It is clear, therefore, that the operation by the city of Monroe of a street railway is a private undertaking for private gain, and that the position of defendant municipality in the case at bar is the same as that of a private corporation engaged in the same business.
>
> While, in the matters affecting the public welfare, the city of Monroe may pass all reasonable ordinances as to the regulation of railroads within its jurisdiction, under the statutes relied upon in this case, yet, quoad its private enterprise, or street railway, defendant municipality does not enjoy the status of a governmental agency, but is governed by the rules applicable to a private corporation." 164 La. at 1039, 115 So. at 138.

In Louisiana the principle underlying those cases may be traced to the decision of the Louisiana Supreme Court on rehearing in *New Orleans, Mobile and Chattanooga Railroad Company v. City of New Orleans*, 26 La. Ann. 478 (La. S.Ct. 1874), where the court held that a municipal corporation had a dual nature, in part public, in part private:

> "In all that relates to one class it is merely the agent of the State and subject to its control; in the other *it is the agent of the inhabitants of the place*—the corporators—maintains the character and relations of individuals, and is not subject to the absolute control of the Legislature, its creator." *Id.*, 481, emphasis added.

When Plaquemine refuses to serve gas or water to somebody living outside its city limits who is being served electricity by

LP&L, unless the customer requires LP&L to disconnect him so he can take electricity from Plaquemine, then Plaquemine is not acting as a governmental agency or one to whom the state has delegated the exercise of some sovereign rights. Rather it is acting purely and simply to profit those who own it—the inhabitants inside the City. If Plaquemine gets together with other municipal utility systems and encourages them to adopt the same practice further to diminish the business of LP&L, to improve its bargaining position, or for whatever purpose, Plaquemine is not acting as a sovereign but as a conspirator in restraint of trade.

In the circumstances, the Cities cannot meet the criteria for immunity from antitrust liability established by this Court in *Parker v. Brown*, 317 U.S. 341 (1943); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). The Cities fall short of the *Goldfarb* criterion because they have not shown that the activity in question "is required by the State acting as sovereign." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790 (1975). The Cities also fail to meet the *Cantor* criterion for they have not shown that the anticompetitive activity in question is in fact "official action taken by state officials." 428 U.S. 579, 591 (1976).

In their Brief the Cities claim that a decision contrary to their interests would strike a blow at "this nation's federalist structure." (Petitioners' Brief, p. 23.) As this implies that somehow the policy of the State of Louisiana is in accord with the Cities' anticompetitive activities, the record should be set straight.

The Cities ignore that the antitrust laws themselves are part of the "restrictions imposed by general law for the protection of other communities" which municipalities are bound by the provisions of La. R.S. 33:621 to observe in the operation of any public utility systems. Louisiana itself has an antitrust stat-

ute, La. R.S. 51:121 *et seq.*, which together with Federal antitrust law, is part of this general law.

Immediately after *Goldfarb* the Legislature of Louisiana provided for the creation of a new type of municipal-county (parish) electric entity. In the neighboring state of Florida, where a United States district court had refused to grant a motion to dismiss a counterclaim against a municipal utility system charging a tie-in illegal under the antitrust laws,[11] a state court decision on state law had raised questions about the applicability of the law to a municipal-county entity.[12] The Louisiana Legislature went to such lengths to make sure that the creation of such an entity could not be used to immunize its participants from the antitrust laws that it expressly provided in Act 597 of 1975, R.S. 33:1334(G) that nothing therein ". . . shall be construed to grant an immunity to or on behalf of any public instrumentality created under this Act from any antitrust laws of the state or of the United States." Thus, there is simply no showing of state policy in favor of the restraints in question.

II. Application of the Antitrust Laws to Municipally-Owned Utility Systems Does Not Offend Public Policy

After having devoted a few pages of their argument (Petitioners' Brief pp. 7-15) to their reading of *Parker*, *Goldfarb* and *Cantor*, the Cities devote the bulk of their argument (Petitioners' Brief, pp. 15-24) to an attempt to establish that application of the antitrust laws to municipalities somehow is against public policy. An analysis of the principles and policies underlying the antitrust laws and the decisions of this Court shows their argument to be in error.

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[11] *Gainesville Utilities, et al. v. Florida Power Corporation, et al.*, Docket No. 68-305-Civ-J, Order of September 25, 1970 (M.D.Fla. 1970).

[12] *University Avenue Church of the Nazerene v. City of Gainesville*, Case No. C-1329-72 (Alachua County, Florida, 1973).

A. Protection Against Injury to Competition.

For purposes of their argument the Cities are fortunate in being able to divine a single purpose for the antitrust laws of the United States, *i.e.*, to protect against vast accumulations of private wealth. (Petitioners' Brief, p. 24.) Though this certainly may be one of the purposes of the antitrust laws, it is not the only one. Petitioners' citation to the portion of *Standard Oil Co. v. United States*, 221 U.S. 1, 50 (1911), discussing the Congressional debates is not the whole story. Certainly Senator Sherman was not so narrow as the petitioners would have it. Speaking in support of his bill, he stated that his bill sought "only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer."[13]

If consumer welfare is indeed at least one of the policies underlying the Sherman Act, petitioners' argument for a narrow construction of the Sherman Act must be rejected. It is impossible to see how a customer who is forced by a tie-in to take electricity from a municipality at a price higher than that offered by an investor-owned utility and who lives outside the city limits is less injured by the municipal utility than he would be by the same conduct undertaken by an investor-owned dual service utility, of which there are a number.

Moreover, this Court in *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911), the case cited by petitioners, looked to the law of this country as it existed at the time of enactment to construe the words of the Sherman Act rather than to the subjective motives of the lawmakers, which it described in the portion quoted by petitioners. Looking to this Court's understanding of the law of the time as a guide to the meaning of the Sherman Act we do find this very succinct statement immediately preceding the Court's statutory exegesis:

[13] 21 Congressional Record 2457 (1890).

> "Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." 221 U.S. at 58.

If we then turn, as the Court in *Standard Oil* did, to the very text of Section 1 of the Sherman Act, it is difficult to find in it the limitations which petitioners would find:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal. . . ."[14]

Moreover, whatever the original intent of the Sherman Act, it is clear that the text of Section 4 of the Clayton Act,[15] providing treble damages to one injured "in his business or property", constitutes a Congressional recognition that one of the

[14] 26 Stat. 209 (1890), as amended, 15 U.S.C. §1.

[15] 38 Stat. 731 (1914), as amended, 15 U.S.C. §15.

purposes of the antitrust laws, including the Sherman Act and Section 3 of the Clayton Act,[16] is to protect against the effect of injury to competition on competitors. Nothing in Section 4 of the Clayton Act discriminates between types of persons protected against injury in business or property.

In *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973), this Court established the policy that the antitrust laws would govern the competitive relationship between municipally-owned utility systems and investor-owned utility systems in the absence of any pervasive regulatory scheme inconsistent with such laws. Under *Otter Tail*, to the extent practicable, competition is supposed to serve as a force regulating the business relations of municipalities and investor-owned utilities.

A holding that a municipally-owned utility is absolutely immune in all circumstances under *Parker v. Brown* would deprive the courts of the opportunity of considering both sides of the competitive relationship between the respective entities and, therefore, of an opportunity to get at the facts necessary to make the Sherman Act apply to the utility industry in a rational manner. A holding of the inapplicability of the antitrust laws to such entities is thus clearly at odds with the principles underlying *Otter Tail*.

The District Court stated in its written reasons for dismissing LP&L's counterclaim that it was reluctant to hold that entities such as the Cities must always be immune from the antitrust laws where the cities "are engaging in what is clearly a business activity; activity in which a profit is realized." (App. p. 47.) Underlying this reluctance appears to be a sense of fundamental fairness, of what the Cities derisively term the "goose/gander argument." (Petitioners' Brief, p. 22.) By its decision in *Goldfarb v. Virginia State Bar Association*, 421 U.S. 773 (1975), this Court removed the barrier to full implementation of the

[16] 38 Stat. 731 (1914), as amended, 15 U.S.C. §14.

principles of *Otter Tail* presented by the imperfect appellate articulation of the state action doctrine. LP&L urges the Court not to re-erect the fallen obstacle.

Most of petitioners' policy arguments are merely makeweight. For example, the arguments of second-guessing state legislatures (Petitioners' Brief p. 20), the alleged vagueness of the standard for treble damage or criminal liability (Petitioners' Brief p. 21), and the potential disruption of services essential to the community (*ibid*), all have applicability to the effect of potential liability on the services and capital needs of investor-owned utility companies. Under *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973), these policy considerations are given less weight than the principle of competition.

Petitioners ignore the actual policy implications of their argument on the intricacies of the structure of the electric utility industry in which there are varying shades of public participation, ownership and regulation of utilities. How, for example, would plaintiffs' proposed rule of immunity affect a joint venture of a public power authority, such as the Power Authority of the State of New York, and an investor-owned utility such as, for example, Consolidated Edison Company?[17]

At present, under Section 105 of the Atomic Energy Act of 1954, 68 Stat. 938 (1954), as amended, 42 U.S.C. § 2135, both public and private entities are subject to antitrust scrutiny.[18]

[17] The company plans to operate a nuclear unit owned by New York. See *Consolidated Edison Co. of New York, Inc. (Indian Point Nuclear Generating Unit No. 3)*, NRC Docket 50-286, 40 Federal Register 31044 (July 24, 1975).

[18] Public entities are required to submit the same information as investor-owned entities for antitrust review under Nuclear Regulatory Commission Regulations, 10 C.F.R. Pt. 50, Appendix L (1977). For an example of antitrust scrutiny of a public entity in this context, see *Omaha Public Power District*, NRC Docket No. P-556-A, 40 Federal Register 28877-8 (July 9, 1975), reproduced in the Addendum at the end of this brief as a convenience to the Court. For an instance where conditions were recommended to be imposed for anti-

Under petitioners' argument there could be no such scrutiny of public entities.

B. **The Effect Upon Stability of Decisions**

The "policy" argument by petitioners that their view "is consistent with decisions of the courts of appeals prior to *Goldfarb*" (Petitioners' Brief, p. 16), points up the need to consider the effect of the adoption of their view upon the post-*Goldfarb* actions of the lower federal courts. A survey of actions by and in these courts shows that the policy of stability of decisions weighs in favor of sustaining the Fifth Circuit's decision.

In *Duke & Company, Inc. v. Foerster*, 521 F.2d 1277 (3rd Cir. 1975) the Court of Appeals reversed the dismissal of three municipal corporations from a private antitrust action and held:

> "We read *Goldfarb* as holding that, absent state authority which demonstrates that it is the intent of the state to restrain competition in a given area, *Parker*-type immunity or exemption may not be extended to anti-competitive government activities. Such an intent may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity." *Id.*, 1280.

Prior to *Goldfarb*, the district court in *United States v. Oregon State Bar*, 385 F.Supp. 507 (D. Ore. 1974) refused to dismiss a civil action brought against the Oregon Bar, a state agency by law. *Id.*, 508. After *Goldfarb*, the court granted defendant's motion to dismiss for mootness on grounds that "[t]he recent decision of the Supreme Court in *Goldfarb*, *supra*, coupled with

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trust reasons on a unit partly owned by a municipality, albeit owing to the alleged conduct of the investor-owned partners, see *Los Angeles Dept. of Water and Power, et al.*, NRC Docket No. P-499-A, 40 Federal Register 57518-9 (December 10, 1975). The activities of the public entities were nonetheless scrutinized as the Department concluded: "In our review of the activities of LADWP, State of California, Anaheim, Glendale, Riverside, NCPA and Pasadena no evidence of anticompetitive conduct has come to our attention." Id., 57519.

the Oregon Bar's withdrawal of the suggested fee schedule and its announced intent to refrain from any further activity in this area indicates that the practice complained of cannot reasonably be expected to recur." *United States v. Oregon State Bar*, 405 F.Supp. 1102, 1104 (1975). The stability which made this decision possible would be undermined by adoption of the Cities' position.

On August 11, 1975 the Fifth Circuit granted a motion by the United States for summary reversal of a district court's quashing of a civil investigative demand whereby the Department of Justice sought to examine the affairs of a state agency, the Texas State Board of Public Accountancy. *Texas State Board of Public Accountancy v. United States*, Docket No. 75-2621, Order of August 11, 1975 (5th Cir. 1975). The dismissal by the district court had been predicated in large part upon state action immunity. *Texas State Board of Public Accountancy v. United States*, Docket No. A-74-CA-270, Memorandum Opinion and Order of April 16, 1975 (W.D. Tex. 1975). This Court denied certiorari. *Texas State Board of Public Accountancy v. United States*, 423 U.S. 1033 (1975). Subsequent to *Goldfarb*, the United States brought a civil antitrust action against the same state agency and this time the United States District Court for the Western District of Texas held against the state agency on its motion to dismiss. *United States v. Texas State Board of Public Accountancy*, Docket No. A-76-CA-219, Order of February 18, 1977, (W.D.Tex. 1977). A reversal of the Fifth Circuit's decision now would certainly disrupt that proceeding.[19]

C. **A Rigid Bright-Line Rule Would Be Unsound Policy.**

Petitioners are frank in their argument that "monopoly" power is "the essence of government itself." (Petitioners' Brief,

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[19] On May 26, 1977 the United States Court of Appeals for the Seventh Circuit joined the Third and Fifth Circuits in their interpretation of *Goldfarb* as applied to public entities. See *Kurek v. Pleasure Driveway and Park District of Peoria*, — F.2d —, 1977-1 *Trade Cases* ¶ 61,448 (7th Cir. 1977), published while this brief was at press.

p. 21.) So it is where the government acts as sovereign to regulate. But why should this monopoly power be extended into a sphere where the entity is not acting as sovereign, *i.e.*, regulating, but conducting a business? Should a company town that engages in the generation of electricity be permitted to restrain trade because it is a municipality? Should a state that takes over a business as a creditor be entitled to conduct that business thenceforth in a monopolistic fashion?

What would happen if a large national corporation were to incorporate a small municipality, a relatively easy matter in Louisiana under La. R.S. 33:31 *et seq.*? Could that corporation then be free to monopolize or restrain trade and commerce in the industry of which it is a part simply by having the municipality, which it controlled, take the requisite action?

Petitioners rely upon *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) in their attempt to establish the "policy" of the Sherman Act. (Petitioners' Brief p. 24.) There a statute expressly granted an immunity. The Cities, in asking for an absolute immunity without an express statute granting it go too far: There are limits. See *Meat Cutters Local 189 v. Jewel Tea Company*, 381 U.S. 676 (1965); *Connell Construction Co. v. Plumbers & Steamfitters Local*, 421 U.S. 616 (1975).

In reality, the "policy" advanced by petitioners is not truly consistent with the pre-*Goldfarb* decisions of district and appellate courts as petitioners argue. (Petitioners' Brief, p. 16.) There was no consensus on an absolute rule.

The decisions of the courts of appeal and of district courts following *Parker* were not altogether consistent. Nevertheless, with the notable exception of *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974) it seems fair to say that, even before *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the trend of cases was toward recognition of possible

antitrust liability on the part of public entities in appropriate circumstances.

The United States Court of Appeals for the Fifth Circuit had noted in *Woods Exploration & Producing Co., Inc. v. ALCOA*, 438 F.2d 1286, 1294 (5th Cir. 1971):

> "The concept of state action is not susceptible to rigid, bright-line rules. Each case must be considered on its own facts in order to determine whether or not the anti-competitive consequence is truly the action of the state."

This case, however, did not involve any public instrumentality or agency.

Shortly after *Woods*, the United States Court of Appeals for the District of Columbia Circuit was faced with the necessity of interpreting *Parker v. Brown* in a situation involving a football stadium owned and operated by what the court described as an "instrumentality of the District of Columbia." *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 932 (1971). That court concluded a governmental agency was not absolutely immune because "*Parker v. Brown* involves not just state governmental action: it involves regulatory action in the state's capacity as sovereign. . . ." *Id.*, 937. The court concluded that the "instrumentality" of the District of Columbia could be liable under the antitrust laws. *Id.*, 939-940.

Similarly, the United States Court of Appeals for the Sixth Circuit in *Padgett v. Louisville and Jefferson County Air Board*, 492 F.2d 1258 (6th Cir. 1974), rejected the claim that governmental agencies enjoy an absolute immunity under the antitrust laws:

> "In recent years courts have given considerable attention to Parker v. Brown and have generally rejected '. . . the facile conclusion that action by any public official auto-

> matically confers exemption.' . . . While we similarly reject the proposition of a general governmental immunity, we find it unnecessary to submit *Parker* to an extensive analysis for purposes of the instant case." *Id.*, 1259.

The court, however, concluded that the entity in question was performing "a valid governmental function to which the antitrust laws do not apply" in the "regulation of ground transportation services." *Id.*, 1260.

In this vein, several district courts had ruled against claims of *Parker* immunity by various public entities, including municipal corporations. In *Azzaro v. Town of Branford*, 1974-2 *Trade Cases* ¶ 75,337 (D. Conn. 1974), the court denied a motion by a municipality to dismiss an antitrust claim against it on the grounds of *Parker v. Brown*, 317 U.S. 341 (1943). The court held that, since the state statutes involved did not authorize anticompetitive conduct, there was no antitrust immunity.

In another case, *Fox v. James B. Beam Distilling Company*, 1974-2 *Trade Cases* ¶75,335 (S.D. Ind. 1974), plaintiffs brought suit against the Indiana Alcoholic Beverage Commission (ABC) "a body empowered to regulate vast areas of dealing in alcoholic beverages in Indiana." (p. 98,058.) The defendant state commission filed a motion to dismiss predicated in part on *Parker v. Brown*. The court held that, despite this defense, the complaint stated a claim upon which relief could be granted in that it alleged anticompetitive conduct beyond the regulatory powers given the agency under state law.

The Cities place great weight upon the pre-*Goldfarb* decision of the United States Court of Appeals for the Ninth Circuit in *New Mexico v. American Petrofina*, 501 F.2d 363 (1974) (Petitioners' Brief pp. 6, 14, 15, 18, 19, 22), as establishing the absolute immunity of all state agencies from the antitrust

laws. There the Court expressly disagreed with *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971). See 501 F.2d at 371.

In a suit brought by the United States against the Oregon State Bar, the court, presented with what it found to be "a public corporation and an instrumentality of the Judicial Department", distinguished *American Petrofina* thus:

> ". . . [I]f a state itself is the defendant in an antitrust suit, no further analysis is required before dismissing the claim pursuant to the state action doctrine. However, when the state is not the named defendant, the court must engage in a comprehensive analysis of the legislative will." *U. S. v. Oregon State Bar*, 385 F.Supp. 507, 510 (D. Ore. 1974).

The court held that "[t]here is not the substantial state direction and involvement required to meet the legislative mandate requirements and to elevate these Oregon State Bar activities to the plateau of 'state action' immunity." *Id.*, 511.

The Cities also place great weight upon the decisions holding that transportation monopolies, established by various states either for general public transportation or for transportation to and from port or airport facilities, were not subject to the antitrust laws because of *Parker v. Brown*. *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966); *Ladue Local Lines, Inc. v. Bi-State Dev. Ag. of Mo.-Ill.*, 433 F.2d 131 (8th Cir. 1970). See also *Trans World Associates, Inc. v. City and County of Denver*, 1974-2 *Trade Cases* ¶ 75,293 (D. Col. 1974).

Yet, where a state agency has gone beyond any monopoly granted by state statute and engaged in anticompetitive conduct not specifically authorized by state law, it has been recognized that there may be liability under the antitrust laws. The immunity granted is thus not absolute. In *Allegheny Uniforms v.*

Howard Uniform Co., Gimbel Brothers, Inc., Amalgamated Transport Union Division 85, and Port Authority of Allegheny County, 384 F.Supp. 460 (W.D. Pa. 1974), the court cited *Ladue Local Lines, Inc. v. Bi-State Dev. Ag. of Mo.-Ill., supra*, in acknowledging that the state statute creating the authority might have been intended to create a transportation monopoly, which would have been immune under *Parker v. Brown*, but concluded that such immunity did not extend to requiring its employees to buy uniforms from particular sources in order to get a statutory subsidy.

CONCLUSION

For the reasons set forth herein, Louisiana Power & Light Company respectfully prays that this Court sustain the decision of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

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Dated: June 14, 1977

Certificate of Service

I, Andrew P. Carter, Attorney for the Respondent, do hereby certify that I have served the Petitioners with 3 copies of the foregoing Brief for Respondent by mailing the same in a properly addressed envelope with proper postage prepaid to Jerome A. Hochberg, Esq., 1990 M Street, N.W., Washington D.C. 20036, Attorney of record for Petitioners.

This the 14th day of June, 1977.

s/ Andrew P. Carter
Andrew P. Carter

ADDENDUM

ADDENDUM

Extract From the Federal Register, Vol. 40, No. 132, pp. 28877-8 (9 July 1975).

[Docket No. P-556-A]

NUCLEAR REGULATORY COMMISSION
OMAHA PUBLIC POWER DISTRICT

Receipt of Attorney General's Advice and Time for Filing of Petitions to Intervene on Antitrust Matters

The Commission has received, pursuant to section 105c of the Atomic Energy Act of 1954, as amended, a letter of advice from the Attorney General of the United States, dated June 23, 1975 a copy of which is attached as Appendix A.

Any person whose interest may be affected by this proceeding may, pursuant to § 2.714 of the Commission's rules of practice, 10 CFR Part 2, file a petition for leave to intervene and request a hearing on the antitrust aspects of the application. Petitions for leave to intervene and requests for hearing shall be filed by August 8, 1975 either (1) by delivery to the NRC Public Docketing and Service Section at 1717 H Street, N.W., Washington, D.C., or (2) by mail or telegram addressed to the Secretary, Nuclear Regulatory Commission, Washington, D.C. 20555, ATTN: Docketing and Service Section.

For the Nuclear Regulatory Commission.

ABRAHAM BRAITMAN,
Chief, Office of Antitrust and
Indemnity, Nuclear Reactor
Regulation.

APPENDIX "A"

OMAHA PUBLIC POWER DISTRICT, FORT CALHOUN STATION, UNIT NO. 2, DEPARTMENT OF JUSTICE FILE NO. 60-415-117, NUCLEAR REGULATORY COMMISSION DOCKET NO. P-556-A

June 23, 1975.

You have requested our advice pursuant to the provisions of Section 105 of the Atomic Energy Act as amended, in regard to the above-cited application.

Introduction. This is an application to construct an 1150 megawatt nuclear power plant to be located at a site near Blair, Washington County, Nebraska. Since the filing of the application, applicant, Omaha Public Power District (OPPD), and Nebraska Public Power District (NPPD) have entered into an ownership agreement whereby each party will own as tenants in common 50% of the nuclear unit. OPPD and NPPD have agreed to offer ownership shares in the unit to entities within the State of Nebraska which operate electric generating or distribution systems, the aggregate amount of such shares not to exceed 20% of the total capacity of the unit. It is anticipated that the municipally-owned Lincoln Electric System will participate in the unit by owning a minimum share of 150 megawatts, a figure which will be larger if other, smaller entities to whom participation has been offered, decline to participate. The most recent session of the Nebraska Legislature passed legislation specifically authorizing public power districts and municipalities to engage in joint ownership of power plants such as Fort Calhoun, Unit No. 2.

NPPD has not been included in the antitrust review which is the subject of this advice because the necessary information has not yet been received by the Department.

Omaha Public Power District. Omaha Public Power District is an agency of the State of Nebraska.[1] OPPD's most recent peak demand, 1,117 megawatts occurred on July 18, 1974, at which time it had 1,334 megawatts of dependable generating capacity. Peak demand on OPPD's system over the next ten years is expected to nearly double. The bulk of this load growth will be met by the addition of a 575 megawatt fossil-fired unit in 1979 and Unit 2 of the Fort Calhoun Station in 1983.

OPPD serves in extreme Eastern Nebraska in a ten-county area extending north and south along the Missouri River. OPPD's load centers, wholesale and retail, and its generation are tied together by a system of high voltage and extra high voltage transmission lines. A 345 kv transmission line running the length of OPPD's system forms a significant segment of the major transmission line which reaches from Minneapolis, Minnesota to Omaha to Kansas City, Missouri. OPPD and Northern States Power Co., Interstate Power Co., Iowa Public Service Co., St. Joseph Light & Power Co., and Kansas City Power & Light Co. are parties to an interconnection agreement by which the parties engage in coordinated system planning and operations. The agreement provides for the use of the 345 kv interconnection for the sale and exchange of various types of power and energy including emergency energy, scheduled outage power, participation power, diversity interchange, and excess energy.

In addition to the above agreement, OPPD is a participant in the Mid-Continent Area Power Pool Agreement (MAPP), a regional power pool which includes membership by nearly all major electric utilities in a vast area of the Northcentral United States. Through its participation in the MAPP Pool, 345 kv Interconnection Agreement, and other interconnection agree-

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[1] See generally Neb. Rev. Stat. §§70-601 to -680, 70-1001 to -1020, 70-1101 to -1106 (1971).

ments,[2] OPPD is accorded access to the full range of bulk power supply coordinating services and arrangements.

OPPD is also a member of a regional reliability organization, the Mid-Continent Area Reliability Coordination Agreement (MARCA).

Small generating municipalities operating within OPPD's service area, including the cities of Fremont, Blair, Falls City, Tecumseh, and Nebraska City, Nebraska are assisted by interconnection agreements with OPPD. These agreements generally provide the municipalities with partial-requirements service to supplement their own generation, and coordinating services such as emergency service, economy energy, and interchange energy. OPPD has offered ownership shares of the subject nuclear plant to these municipalities, individually and collectively, but at this time it is thought unlikely that such municipalities will elect to participate.

With respect to the matter of wheeling services, there is no recent evidence that OPPD has refused to permit third parties to transmit power over OPPD's transmission facilities. OPPD currently wheels power from the U.S. Bureau of Reclamation to two municipalities in OPPD's area. Moreover, OPPD has assured this Department that OPPD will wheel power, under appropriate terms and conditions, for any utilities in OPPD's area, specifically including Bureau of Reclamation power, power to participants in Fort Calhoun, Unit 2, and power between and among utilities that may themselves install jointly owned power plants.

Regulation of Electric Power in Nebraska. Electricity in Nebraska is generated, transmitted and distributed by public

[2] OPPD is also interconnected with or has contracts with the Nebraska Public Power District, Iowa Power & Light Co., Kansas Gas & Electric Co., Kansas Power & Light Co., and the United States Bureau of Reclamation.

power districts, municipalities, and cooperatives. Unlike most states, there are no privately-owned electric utilities operating in Nebraska. Thus, the typical patterns of competitive conflict found in many states are not present here.

The Nebraska Power Review Board has regulatory jurisdiction over the installation of new generation and transmission facilities in that state, but has only advisory responsibilities over retail and wholesale rates, which are set by the suppliers.

Interconnection and coordination of facilities, including compulsory wheeling over surplus transmission capacity, is also encouraged and declared by statute to be state policy.

Results of Antitrust Review. After investigation of OPPD's conduct in light of the existing market structure in Nebraska, the Department has found no basis upon which to recommend an antitrust hearing.

[FR Doc. 75-17567 Filed 7-8-75; 8:45 a.m.]